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Commentary

Public Interest Practice in Practice: The Law and Reality

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At its best, the practice of public interest law is exciting, stimulating, and intensely rewarding. Public interest lawyers have reformed and enforced laws concerning the social and economic welfare of the poor, minorities, and other disadvantaged groups by pursuing major litigation on their behalf. Due to the efforts of public interest attorneys, welfare recipients cannot be removed from welfare rolls without a hearing,[1] poor women can receive government-paid abortions in California,[2] handicapped children are entitled to an education appropriate to their needs,[3] landlords cannot refuse to rent to families with children,[4] and children of illegal aliens cannot be excluded from schools.[5]

At its worst, public interest practice is frustrating and fraught with institutional obstacles. Financial and personnel cutbacks in legal services programs have virtually eliminated access to the courts for many disadvantaged individuals and have discouraged law school graduates

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1. Goldberg v. Kelly, 397 U.S. 254 (1970).

2. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

3. *See* Education of the Handicapped Act, 20 U.S.C. §§ 1401-1461 (1976 & Supp. V 1981).

4. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).

5. Plyler v. Doe, 457 U.S. 202 (1982).

from entering the public interest market.[6] The present administration's policy on appointments and congressional legislation has decimated the power of traditional watchdogs such as state and federal attorneys general and fair housing and employment commissions to enforce civil rights laws.[7] The absence of resources in public interest practice minimizes the effect of the public interest movement in both the political and legal processes. In addition, the number of people with a need for these inexpensive or free legal services has burgeoned to unexpected and overwhelming proportions.[8]

The dedication of this issue of the Hastings Law Journal to public interest issues and practice tends to recognize public interest practice as a thriving branch of law. In fact, the growth of public interest practice has been stymied by formidable obstacles. This Commentary examines some of the major obstacles to the effective practice of public interest law. First, it discusses the role of law schools and their curricula. Second, it analyzes the tendency of the bar to maintain the status quo rather than to encourage innovation within the profession. Third, it examines the absence of resources for public interest law generally. Although this discussion by no means covers the problems exhaustively, these particular factors illustrate both institutional and practical barriers to a rewarding career in public interest law. Finally, the Commentary explores how public interest law operates in practice by examining some of the cases and strategies of one public interest law firm, Public Advocates, Inc., in San Francisco.

6. L.A. Times, Jan. 1, 1982, at 1, col. 3. The Reagan Administration succeeded in cutting the Legal Services Corporation's budget from $320 million to $240 million. One proposal by the President sought to discontinue funding for the Legal Services Corporation altogether. Legal Services News, Mar. 9, 1982.

7. *See, e.g.*, Trausch, *Deregulation: Major Impact on Americans*, S.F. Sunday Examiner & Chron., Dec. 26, 1982, at A12. The article details staff and budget cuts of regulatory agencies and the emphasis on rescinding or weakening existing regulations. For example, the Agriculture Department rescinded a regulation requiring packers of mechanically processed meat to call a bone a bone (it is now described as "calcium"). The Food and Drug Administration rescinded a regulation requiring inserts about the side effects of tranquilizers in 10 popularly used prescription drugs. Workers in hospitals or plants that make furniture, chemicals, or antifreeze are exposed to the fertilizer and fumigant ethylene oxide, which increases one's risk of cancer; despite intense pressure, the Occupational Safety and Health Administration has not moved to establish an emergency standard lowering permissible concentrations of this chemical in the workplace, saying only that it will study the problem for the next two to five years.

8. *Cf.* S.F. Chron., Dec. 4, 1982, at 1, col. 5, 12, col. 1 (citing record-setting rate of unemployment among blue collar and white collar workers).

The Role of Law Schools

What transpires in law school that causes many students who entered with high ideals and goals of using their legal education for public service to emerge drone-like three years later to "slave away" in a corporate factory? One factor that contributes to this reverse metamorphosis, from butterfly to worm, is the subordination of self that occurs in legal education. One law school dean compares law students to slaves, suggesting that their "chains are forged, not of iron, but of the magnetic force of money, status, and professional recognition and acclaim";[9] he finds these modern-day vassals gripped by a "fear . . . not of death but of failure."[10] The structure of law school is authoritarian, which prepares law students for authoritarian law firms. This structure tends to instill notions of submissiveness and obedience in students: they learn to subjugate themselves first to law professors and then to firm partners.

Another major factor in this unfortunate metamorphosis is the law school classroom which, like all classrooms, is a place for value inculcation. It is axiomatic that a decision to hire faculty with certain skills and experience, to adopt a course as part of a curriculum, or to teach a particular skill "involves, either implicitly or explicitly, a choice among competing social policies . . . . What is taught and who teaches it is bound to effectuate, favor or advance, to some degree, a particular social interest or policy."[11] Thus, as one author has observed, a decision to teach a course in securities regulation tends to favor corporate clients and a decision to give credit for a clinical course in sex discrimination may serve the needs of low income women.[12] Law schools have to deal with the problem of striking a balance between courses that serve the purpose of "pure" legal scholarship and those that serve clients more directly. Among courses that are oriented toward clients' needs, a further choice must be made among those serving different sectors of the community. The law school must decide whether and to what degree the needs of the poor, the middle class, small businesses, and corporate conglomerates shall be met.

In general, law schools offer courses and programs that tend to serve the business community and the social, political, and economic status quo. Indeed, most lawyers are trained to and ultimately do serve

9. Bell, *The Law Student as Slave*, STUDENT LAW., Oct. 1982, at 18.

10. *Id.*

11. Bloustein, *Social Responsibility, Public Policy, and the Law Schools*, 55 N.Y.U. L. REV. 385, 419 (1980).

12. *Id.*

the interests of the corporate and business community and institutions of wealth and power.[13] Law schools certainly have been less responsive to the less "establishment" segments of society.

Yet, as educational institutions, and in particular as graduate schools, law schools have an obligation to constantly analyze and reevaluate society's changing and growing needs for different types of legal representation and, indeed, to scrutinize the underlying assumptions upon which legal education is premised.[14] When law school personnel undertake such self-scrutiny, however, they often do so within very narrow confines and change comes slowly, if at all.[15]

One assumption, frequently analyzed but rarely abandoned, is the notion that the traditional methodology of analyzing appellate court opinions through casebooks and Socratic discussion in the classroom is the best method to train students to "think like lawyers."[16] This methodology often stifles alternative or creative solutions to legal problems. Under the case method, the law exists in decided cases as a largely complete system.[17] The students' and teachers' task is primarily to identify or "pigeonhole" rules or prescriptions and to describe their logical relationships. The system discourages profound inquiry into

13. Nader, *Crumbling of the Old Order: Law Schools and Law Firms*, THE NEW REPUBLIC, Oct. 11, 1969, at 20-21. *Compare* M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION 11 (1974) ("[s]tudents justify a choice of traditional corporate or government work by complaining that public interest jobs—when available—do not provide careful training, suitable working conditions, fair pay, or a high probability of promoting social change"), *with* Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSP. AM. HIST. 403, 532-34 (1971) (arguing that most attorneys are practitioners rather than policymakers and serve the middle class).

14. The Anglo-American tradition of legal study has incorporated two distinct but conflicting responsibilities or goals. One is to train lawyers and the other is to study law. The former involves the acquisition of a skill; the latter involves the acquisition of knowledge. The conflict arises because law schools fail to balance the values inherent in these two goals. For instance, an emphasis on teaching skills rather than exploring the relationships among law, justice, and the social system ignores inquiry into the nature of justice and fairness in society. On the other hand, an emphasis on purely scholarly or academic pursuits ignores issues of public concern and the use of law and law schools to define and change society's goals. Bloustein, *supra* note 11, at 399-402.

15. *See* First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 314 (1978) (concluding that the "elite-model law school" has created a "non-dynamic industry, slow to change and short on innovation").

16. The case method of law study was introduced in the nineteenth century by Dean Christopher Columbus Langdell; he stressed the studying, in historical progression, of cases that illustrate the evolution of a particular doctrine to its present state. Of prime importance in studying and teaching law was not obtaining practical legal experience but rather reading and analyzing appellate opinions. C. LANGDELL, *Preface* to A SELECTION OF CASES ON THE LAW OF CONTRACTS at i (1871).

17. *Id.* at vi.

underlying data, ethics, or social policy.[18]

The case method also ignores development of certain skills that are essential if students are to become responsible lawyers. There are daily reports of disciplinary actions against lawyers for conduct ranging from mismanagement of clients' funds to forgetting a hearing date.[19] Through instruction in the nuts-and-bolts of the law—drafting complaints, negotiating settlements and counseling both real and simulated clients in criminal, welfare rights, landlord-tenant, juvenile, complex civil and civil rights cases—students can be and occasionally are given firsthand experience in developing lawyering skills and a sense of ethics.[20] Yet most law schools have resisted the full development and promotion of clinical programs.[21] Where such programs have been adopted, they often are viewed with suspicion, perhaps because they

18. Critics of the Langdellian case method of study included Justice Holmes, *see* Holmes, Book Review, 14 AM. L. REV. 233 (1880), and Judge Jerome Frank, *see* Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947), both of whom stressed the study of what courts do in practice and the actual contexts in which legal rights and obligations arise and are enforced.

There is a body of respected and responsible opinion, expressed by philosophers like H.L.A. Hart and, according to Hart, by judges like Holmes and Cardozo, that concludes that "laws are incurably incomplete." H.L.A. Hart, *Positivism and the Separation of Law and Morals,* in THE PHILOSOPHY OF LAW 17, 29 (R. Dworkin ed. 1977). This school of thought posits that cases that fall into open spaces in the law should be decided by considering social goals and making choices among alternatives. *See* B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 102-15 (1921). *Cf.* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466-68 (1897) (use of social value criteria in court decisions).

19. *See, e.g.*, The Recorder, July 28, 1983, at 1, col. 2; Sept. 7, 1983, at 1, col. 1.

20. *See, e.g.*, Banzhaf, *An Experiment in Legal Education: Student Clinical Team Projects*, *reprinted in* M. MELTSNER & P. SHRAG, *supra* note 13, at 60; *see also* Auerbach, *What has the Teaching of Law to do with Justice?*, 53 N.Y.U. L. REV. 457 (1978) (advocating the teaching of clinical programs that invite reflection on the relationship between law and justice).

21. *See* Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 964, 971-75. Hastings College of the Law itself was embroiled in a controversy surrounding the institution of a Public Interest Law Program in Public Interest Law Ass'n v. Hastings College of the Law, No. 762-385 (Cal. Super. Ct. request for dismissal pursuant to settlement agreement filed Apr. 12, 1983).

Located in the heart of one of the most destitute areas of San Francisco, Hastings is ideally situated to house a community legal clinic, thereby providing its students with invaluable legal training while rendering desperately needed legal services to the local community. Yet the school refuses to acknowledge any professional obligation to provide these services. For example, Hastings has completely ignored the recent scandal of local landlords refusing to provide statutorily mandated heat for elderly and poor tenants in the vicinity. *See* S.F. Chron., Dec. 14, 1982, at 1, col. 1; Dec. 15, 1982, at 1, col. 6; Dec. 16, 1982, at 1, col. 4; Dec. 17, 1982, at 1, col. 1; Dec. 18, 1982, at 1, col. 2; Dec. 21, 1982, at 28, col. 5; Dec. 22, 1982, at 2, col. 4; Dec. 24, 1982, at 2, col. 5; Dec. 29, 1982, at 1, col. 1; Dec. 30, 1982, at 18, col. 1. Student participants in a Hastings clinic could have helped ensure that the legal rights of these tenants were protected.

may be "heavily oriented toward solving urban social problems and criticism of the traditional law school curriculum as a training ground for the business community."[22]

Traditional law school course offerings also reveal the basically anti-intellectual nature of legal education. Extensive reading assignments in non-legal literature are so rare as to be an oddity. An understanding of current events is hardly necessary; students can get through most law schools with a grammar school child's knowledge of contemporary affairs. There is also minimal departure from the explication of doctrine to explore the relation of law to other disciplines, such as political theory. Similarly, real debate of alternative views of public or social policies underlying doctrines is limited. The traditional method of teaching law can be deceptive because it leads law students to believe that only those doctrines that are being taught are important in the practice of law; it is frequently inadequate in that students are given little opportunity to test or evaluate such doctrines or compare them with other disciplines. In this regard, law schools are neither designed to nor serve as training grounds where the nation's future lawyers are challenged to consider the character and exigencies of their important social role.

The Role of The Legal Community

The growth of public interest law as a branch of law has also been stymied by the non-legitimizing attitude of some of the bar towards public interest lawyers. The view remains that anyone who does not follow the traditional pattern of getting into corporate law straight out of law school may not be a first rate lawyer and that the work of public interest attorneys is less sophisticated.[23] The sources of this prejudice are not entirely clear. Perhaps, in a society that equates success with money, the absence of top salaries and fringe benefits carries the implication that the lesser paid lawyer is not as competent.[24] Also, many members of the bar seem to assume that the skills and expertise developed in public interest practice are narrow and specialized, non-transferable to and unmarketable in other areas of legal practice.[25] It may also be a factor that public interest lawyers threaten to change the status quo.[26] Indeed, when representing disadvantaged groups against the

22. *See* Bloustein, *supra* note 11, at 413.
23. *See generally* L.A. Times, Sept. 30, 1982, pt. V, at 1, cols. 1-2.
24. *Id.*
25. *Id.*
26. *Id.*

business community or the government, public interest lawyers may attack the clients of corporate law firms. Finally, any group within an occupation that has different views and goals from the majority is bound to be regarded with some suspicion.

The bar's notion that traditional law firms can sufficiently correct the imbalance between represented and underrepresented groups through pro bono work is a myth.[27] First, the firms are highly selective in the types of cases that they choose to pursue pro bono.[28] Second, cases they select often afford little lasting relief to the underrepresented because the work usually involves a case or two rather than ongoing and substantial involvement with a social issue.[29] Finally, and most importantly, the amount of time and money expended for pro bono cases is miniscule compared to the resources expended for traditional cases.[30]

Matters are made yet worse by the fact that the bar has been unable or unwilling to curb the escalating and prohibitive costs of legal services. Attorneys may charge $200 per hour and more for their services; depositions are billed at $75 per hour and more.[31] At a time when

27. There was a time in the early 1970's when pro bono services represented not only a sizeable resource for the support of public interest law, but also the hope that through the institutionalization of such work within private law firms public interest law itself would be institutionalized. *See* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE (1976) [hereinafter cited as BALANCING THE SCALES] (discussing Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1036 (1970)). "But as the 1970s progressed, the trend toward establishing new and formal mechanisms for fostering public interest work . . . within private law firms waned." BALANCING THE SCALES, *supra*, at 303.

28. "[I]t is not infrequently discovered that, in certain specialized areas of law, all experts either have clients whose positions would be in conflict with that of a particular citizen group, or the work requested is too complex and lengthy to be provided free or at a substantial discount." BALANCING THE SCALES, *supra* note 27, at 301.

29. In 1973-1974, Professor Joel Handler and his colleagues at the University of Wisconsin Law School undertook an empirical study of the work that lawyers and law firms perform pro bono. The report noted that such work fell largely into two categories: legal services for the poor, without litigation, and, to a somewhat lesser extent, legal services for civic groups. Moreover, these activities were largely supplements to public programs providing legal aid or criminal defense to the indigent. Finally, the report concluded that the private practitioner did relatively little public interest work of a policy-related nature. Handler, Hollingsworth, Erlanger & Ladinsky, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388, 1391 (1975).

30. Professor Handler's report, *supra* note 29, found that approximately 6% of the average lawyer's billable time, as reported by lawyers themselves, is devoted to pro bono work. As for public interest work during non-billable time, the average of the entire bar was 27 hours per year; 38% of the lawyers in private practice reported they did no pro bono work outside of billable hours. *Id.* at 1389.

31. In a recent speech that sketched a profile of a discovery abuser, a New York lawyer with tongue in cheek outlined the possibilities for running up costs with interrogatories:

severe cutbacks in legal services have put impossible demands on legal as well as community resources, and the need for legal representation has also increased, there is a serious risk that justice will be available only for the privileged few.[32] Such an elite system will ensure the continued inaccessibility of the legal process for the vast majority of the public.

It is not uncommon to have a set of interrogatories run 380 pages, containing 50 definitions with 2,800 questions including subparts. So that no one will mistake your virility, you label these as First Set of Interrogatories. And you propound them to every party in the case. Assuming it takes a bare minimum of 10 minutes per question to answer at lawyers' fees of $50 an hour, it will cost one responding party $22,800 to answer, and that's if you let your most junior associate work on it.

Copies cost 10 cents per page if you're lucky, so the Xerox bill to create one set of answers and objections is about $400 per set. If you have 15 parties in the case the arithmetic says it's $6,000 plus the lawyers' fees of $22,000 times 15—over $300,000 total cost. You have not yet, of course, argued the inevitable motion to compel further answers or your own motion for a protective order or responded to the second or third set of interrogatories, or served your own, equally abusive set.

Lewin, *A Plan to Limit Pretrial Work*, N.Y. Times, Dec. 14, 1982, at 30, col. 3.

32. *See, e.g.*, CAL. CIV. PROC. CODE §§ 638-647 (West 1973 & Supp. 1982), the so-called "rent-a-judge" statute. At a cost of $200 per hour for the judge, the wealthy can secure quality justice expeditiously and secretly. According to some critics the statute creates a "quasi-private judicial system for the wealthy." Hager, *Rent-a-Judge Use Examined, Criticized*, L.A. Times, Dec. 22, 1981, at 3, col. 1 (quoting California Chief Justice Rose Bird). A majority of lawyers favor rent-a-judge and they have raised four primary points in favor of the the system. The first is that it is hardly used. This is refuted both by the statistics (more than 40 rent-a-judges in Los Angeles alone), and the bar's second major argument that rent-a-judge will eliminate trial delay. At present, in Los Angeles alone, there are more than 230,000 new superior court cases filed every year. Even assuming 500 rent-a-judge cases a year (approximately five times the present level) and giving each a weight ten times that of all other cases (due to the likelihood that rent-a-judge cases are likely to be more complex), this could amount to only 5,000 cases, or what would constitute only two percent of new filings annually. Therefore it could, at best, reduce court delay from 59 months to 58.5 months. In fact, 11,000 Los Angeles County Superior Court cases forced into arbitration during the year 1979-1980, according to all parties involved, had no significant impact on unclogging the court. One source states that only 3,804 were put on the arbitration list by court order and only 11,245 total were arbitrated in Los Angeles during that period. 1981 JUDICIAL COUNCIL REPORT: ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS 66 (1981).

The bar's third point is that rent-a-judge is similar to arbitration, and everyone favors arbitration. However, if it is like arbitration, which is statutorily provided for in California Code of Civil Procedure §§ 1280-1299, why is there a need for rent-a-judge? The reason may be that the wealthy want the best of both worlds: arbitration-like conditions and the unlimited right to appeal and tie into the public appellate process. The right of appeal in arbitration is restricted. CAL. CIV. PROC. CODE § 1294 (West 1981).

The bar's fourth argument may be the most persuasive, depending on one's bias. It argues that the wealthy have always had preferred status as to housing, education, transportation, and dining, so why not also in terms of the legal system? From the point of view of consistency there is much merit to this argument. Those who have opposed rent-a-judge, however, have never believed that our legal system sanctioned, or should sanction, any preferences as to either the right to vote or to have access to the judicial system based on wealth.

The bar's refusal to provide adequate legal representation for the disadvantaged undermines what little public interest legal work is being done. The staggering needs of the underrepresented overwhelm the capacity of the relatively few lawyers available to work on their civil legal problems. So long as the supply of lawyers for indigents and the disadvantaged trails drastically behind demand, legal services lawyers must engage in a variety of caseload limitation techniques such as refusing to accept complex cases, restricting clients to limited residential areas, periodically refusing all clients by closing the doors, and excluding classes of cases.[33]

The bar's refusal to legitimize and systematically promote public interest law[34] has the practical effect of denying representation to persons who are most in need of it and least able to pay for it. This denial contravenes the fundamental duty of the profession to provide representation to all:[35]

> [T]here is a responsibility on the bar to make legal services available to those who need them. The maxim "privilege brings responsibility," can be expanded to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it.[36]

The Absence of Resources and the Example of the Legal Services Corporation

To view the public interest movement in the narrow framework of legal practice is to focus on only one small part of that movement. Viewed in its entirety, the public interest movement is hampered in every arena by a lack of resources.[37] For example, public interest

33. Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 U. DET. J. URBAN L. 217, 227-34 (1969).

34. Ironically, despite the prejudices of the bar and the substantial impediments to the effective practice of public interest law, such public interest practice appears to serve as a salve for the conscience of the bar. It is the authors' observation that the bar, when confronted with public criticism that lawyers are nothing more than outrageously paid professional guns, points to public interest practice to show that powerless groups in society are indeed benefitted by our legal system.

35. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979) (a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available); *see also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 320 (1968) ("It is not only the right but the duty of the profession as a whole to utilize such methods as may be developed to bring the services of its members to those who need them, so long as this can be done ethically and with dignity.").

36. Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar*, 12 U.C.L.A. L. REV. 438, 443 (1965).

37. A study was conducted to determine the funding source for 86 public interest centers for the years 1972-1975.

groups cannot finance the different and numerous types of litigation required to challenge legislation that adversely affects the rights of disadvantaged groups, or that overturns in one fell swoop a hard-won court victory. They also have minimal influence in the legislative arena in comparison to those who have strong organized lobbyists or access to inordinate amounts of political action committee funds.[38] Thus, public interest clients have only a limited voice in the political decision-making processes that affect their day-to-day lives.

Access to some legal representation is absolutely necessary for democratic political rights to have any real meaning. The Legal Services Corporation (LSC) is one organization that helps make equal access to civil legal representation possible for those who cannot afford to hire lawyers.[39] The LSC is critically important to the elderly, disabled, minorities, and the poor, all of whom generally cannot afford to hire lawyers. The very lives of these individuals often depend upon their

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> Foundation grants and contributions from the public have been the leading sources of income for public interest law, each accounting for 37 percent of all money given to the 86 centers in the four years. . . . Funds from the government have also been an important factor. Twenty-two percent of all income has come from that source. Of the remaining income, one percent has come from court-awarded attorneys' fees and three percent has come from other funding sources (such as investment income, sales of publications, and reimbursed costs).

BALANCING THE SCALES, *supra* note 27, at 96-97.

From 1972 through 1975, a total of $130.4 million was contributed to public interest law—a figure that at first glance may seem large but is actually tiny compared to the $10.938 billion in gross receipts for all legal services in 1972 alone. U.S. BUREAU OF CENSUS, 1972 CENSUS OF SELECTED SERVICES at Table 1 (1976). Although the funding of public interest law centers has grown substantially over those years—from $25.8 million in 1972 to $40 million in 1975—total income of these groups compared to other kinds of tax-exempt, non-profit organizations remains miniscule. For example, in 1974, public interest law centers received $33.7 million, or less than .001% of the $50.86 billion received by non-profit charitable health and educational organizations that year and only .04% of the $80.6 billion received by all private non-profit organizations. REPORT OF THE COMM'N ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS: GIVING IN AMERICA 35 (1975).

38. In 1974, "608 PACs contributed $12.5 million to congressional candidates; total campaign spending that year was slightly less than $100 million. When final 1982 figures are totalled, they are expected to show that more than 3,000 PACs contributed $80 million of the roughly $300 million total candidate receipts." Cohen, *The Growing Concern in Washington Over PACs*, W. L.J., Winter 1982, at 4. The two largest PACs

> were established in the late 1970s as major instruments of the political "new right." They are the National Conservative Political Action Committee (NCPAC), run by Terry Dolan, and the National Congressional Club, chaired by Sen. Jesse Helms, R-N.C. Each spent roughly $10 million [during the 1981-82 election] cycle.

Id.

39. LEGAL SERVICES CORP., ANNUAL REPORT 1981 at 7 (1981) [hereinafter cited as 1981 REPORT]. *See also* Wall St. J., Dec. 9, 1982, at 5 ("After all the derelictions of the LSC are counted and weighed, what remains is a program that at its core is admirable: 'It helps the poor.' ").

ability to protect themselves against myriad forms of discrimination in employment, housing, education, and health care.

Although the LSC survived an attempt by the Reagan Administration in 1982 to abolish it, its already minimal budget was substantially reduced,[40] restrictions were placed upon its lawyers,[41] and directors were nominated who are hostile to its objectives.[42] The result at the local level has been a severe reduction of lawyers available to disadvantaged persons. Some local offices have shut down; others have closed their doors to any new cases or have limited the type of cases they will now handle.[43]

Perhaps the major roadblock to securing funds for legal services is the criticism of those who are in control of the pursestrings. For instance, President Ronald Reagan once described legal services lawyers as "a bunch of ideological ambulance chasers doing their own thing at the expense of the poor who actually need help."[44] Similarly, Senator Jeremiah Denton, Chairman of the Senate Subcommittee on Security and Terrorism, stated that "groups that produce propaganda, disinformation, or 'legal assistance' may be even more dangerous than those who actually throw the bombs."[45] These attacks are, as one editorial noted, reminiscent of earlier attacks made upon progressive lawyers throughout the years. For example, in 1946 the Attorney General of the United States lashed out at trade unions, labor leaders, communists, and "revolutionary lawyers." He attacked those lawyers who fought most actively for the liberty of people and expressed the conviction "that our bar associations with a strong hand should take these too

40. *See supra* note 6.

41. 1981 REPORT, *supra* note 39, at 7.

42. Interviews with LSC Board nominees conducted by Steven Brault, staff attorney at the Equal Justice Foundation, revealed that none of the original nominees recognized poverty law as an area of expertise. Some confessed to knowing little about the LSC program, and some revealed a low regard for the philosophy behind the LSC. *The Tither*, EQUAL JUST. FOUND. NEWSLETTER, Apr.-June 1982.

43. IMPACT, Dec. 1981, at 1.

> San Francisco Neighborhood Legal Assistance, for example, has closed its five neighborhood offices, and now operates solely from the Market Street location. Likewise, the Alameda County Legal Aid Society has closed two of its six local offices. . . . Whereas SFNLAF in the past pursued a broad program which included specialized units in women's litigation and other areas, its entire operation [has been limited to] three specific areas: housing . . . welfare and family law. . . . In nearly all [LSC] offices, family law sections have been eliminated, except for emergency cases involving domestic violence or harrassment.

Id.

44. L.A. Times, Sept. 30, 1982, pt. 5, at 1.

45. GUILD NOTES, Sept.-Oct. 1982, at 12.

brilliant brothers of ours to the legal woodshed for a definite and well deserved admonition."[46]

Although these attacks are ideologically based, they have a material and detrimental impact on the funding and maintenance of legal services for the underrepresented. The loss of legal services for these persons leaves them no way to protect their rights.

The gap in legal representation created by the government's budget cuts has not been filled by the private bar.[47] Indeed, the private bar's insufficient response to poor people's needs for civil legal representation accounted in part for the creation of a federally funded legal services agency in the first place.[48]

Law schools have also largely failed to propose creative solutions to the problems of sustaining and promoting the practice of public-oriented law. Most schools have made no serious attempt to halt the outrageous cutbacks in the Legal Services Corporation. Indeed, as the Reagan Administration contemplated the destruction of the LSC, Hastings College of the Law honored presidential advisor Edwin Meese, a long-time, vehement opponent of the LSC, by having him dedicate one of the College's buildings.

Issues and Strategies of Public Interest Practice: The Caseload of Public Advocates, Inc.

Public Advocates, Inc. is a non-profit, public interest law firm that concentrates on issues of primary concern to the poor, racial minorities, the elderly, women, and other legally underrepresented groups. Since its establishment in 1971, the firm has brought more than one hundred class action suits and has represented more than seventy organizations, including the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Organization for Women, and the Gray Panthers.

This section examines five cases representative of the law practice of Public Advocates: *Officers for Justice v. San Francisco Civil Service Commission*,[49] *Committee for Children's Television, Inc. v. General*

46. *Id.*

47. *See, e.g.*, NAT'L L.J., Dec. 6, 1982, at 6 (noting that while the legal aid lawyers' strike in New York for a wage increase created severe logjams in the courts, several of the city's private bar associations refused to handle the 70% of the criminal cases previously handled by legal aid lawyers).

48. BALANCING THE SCALES, *supra* note 27, at 25-26.

49. 473 F. Supp. 801 (N.D. Cal. 1979).

Foods Corp.,[50] *Punikaia v. Clark*,[51] *County of Kauai v. Pacific Standard Life Insurance Co.*,[52] and Public Advocate's Food and Drug Administration (FDA) Petition on Infant Formula Misuse. These cases demonstrate some of the procedural and substantive obstacles inherent in public interest litigation.

Officers for Justice v. San Francisco Civil Service Commission (OFJ)

The *OFJ* suit was filed in April 1973 by Public Advocates on behalf of the Officers for Justice (OFJ), a predominantly black police officers' organization. The suit charged that city officials manipulated police policies and physical and mental exams to effectively prevent racial minorities and women from being hired and promoted.[53] Plaintiffs sought class-wide relief, including declaratory and injunctive relief, various affirmative remedial measures, class damages, costs, and attorneys' fees.[54]

The case gained support from the National Organization for Women, Chinese for Affirmative Action, and the League of United Latin American Citizens. The National Association for the Advancement of Colored People joined the suit soon after it was filed, and the United States Department of Justice filed a separate action that was merged with the original suit for trial.[55]

After years of winding their way through the courts,[56] trial of the discrimination issues began in November 1978. The trial was recessed after two weeks to permit settlement negotiations and these negotiations produced a consent decree that was approved by all parties and

50. No. 61056 (Cal. Ct. App., 2d Dist., Mar. 30, 1982).

51. No. 82-4189 (9th Cir. Nov. 4, 1982).

52. 65 Hawaii 318, 653 P.2d 766 (1982), *appeal dismissed*, 103 S. Ct. 1762 (1983).

53. Officers for Justice v. San Francisco Civil Serv. Comm'n, 473 F. Supp. 801, 803 (N.D. Cal. 1979).

54. *Id.* at 803-04.

55. *Id.*

56. In November of 1973, the district court issued a preliminary injunction barring the use of discriminatory entrance and sergeant's promotional examinations and imposing a quota of three minority applicants for every two non-minority applicants in hiring patrol officers and a quota of one-for-one in permanent promotions to sergeant. 371 F. Supp. 1328 (N.D. Cal. 1973). In 1975, the court enjoined the use of the 5'6" minimum height requirement for Q-2 officers, imposed a temporary quota for hiring women to Q-2 positions, and ordered that the physical agility test be scored and weighted so as not to discriminate against women applicants. By then a new Q-2 exam had been developed whose overall impact on minorities was acceptable, so the three-for-two entry level quota was dissolved. 395 F. Supp. 378 (N.D. Cal. 1975). In 1977 the one-for-four quota was extended to the temporary appointment of sergeants. 14 Empl. Prac. Dec. (CCH) ¶ 7548 (N.D. Cal. 1977). However, the United States Court of Appeals for the Ninth Circuit stayed that order pending its appeal. The use of a discriminatory Q-35 assistant inspector's exam was also enjoined. *Id.* at ¶ 7549.

submitted to the district court on January 25, 1979. On March 30, 1979, the district court found the settlement to be "a just, fair and reasonable resolution of this action."[57] The consent decree secured an affirmative action hiring program within the San Francisco Police Department that required hiring a minimum of fifty percent minorities and twenty percent women for at least a ten-year period.[58] Despite this seemingly major victory, various provisions of the consent decree are still being litigated,[59] and in all probability they will continue to be litigated in years to come.

OFJ illustrates a few problems that are inherent in public interest litigation. One problem is that, despite a legal victory, the primary objectives of the lawsuit may not be realized. Even after nine years of litigation, there are still no black captains in the San Francisco Police Department and only two black lieutenants.[60] Another problem is the incredible length and cost of the litigation, which has produced no real relief for the plaintiffs.[61] Finally, *OFJ* demonstrates the effect of fac-

57. Officers for Justice v. San Francisco Civil Serv. Comm'n, 473 F. Supp. at 808.

58. *Id* at 814. The decree required the city, inter alia, to promote all of the persons on the 1977 Sergeant and Assistant Inspector eligibility lists by January 1981 and to delay the next examination for promotion to Lieutenant until the new Sergeants would be eligible to take that examination. *Id.* at 814-15. To insure continuing promotional opportunities, the consent decree also required that the city make a specified number of promotions to the ranks of Sergeant and Assistant Inspector annually after August 1, 1981. *Id.* at 815. Accordingly, by operation of that provision, 25 Sergeant promotions and 15 Assistant Inspectors were to be made each year after August 1, 1981. The city is further required to develop new, valid promotional examinations, and to conduct promotional training classes before any promotional examinations can be conducted. *Id.* Finally, the decree obligated the city to engage in sufficient recruitment efforts to meet those goals and to modify its police officer selection procedures in certain respects. *Id.* at 812. To assure compliance with the decree, the parties agreed that the court would retain jurisdiction over the decree for ten years "for the purposes of effectuating the purposes and terms of said decree and providing for enforcement thereof." *Id.* at 820.

59. In the United States District Court for the Northern District of California, the Officers for Justice challenged the city's proposed 79% cutoff score for Phase I of the Police Lieutenants' Examination. Officers for Justice v. San Francisco Civil Serv. Comm'm, Nos. C-73-0656, C-77-2884 (consolidated) (N.D. Cal. Sept. 30, 1982). The Ninth Circuit dismissed an appeal, filed by the intervening Police Officers Association of the district judge's order requiring that the consent decree entry level goals for Sergeants and Assistant Inspectors be met. Officers for Justice v. San Francisco Civil Service Comm'n, No. 82-4346 (consolidated) (9th Cir. memorandum decision dated Sept. 17, 1982).

60. Yearly Sworn Update by Race and Ethnicity, issued by the San Francisco Police Dep't Personnel Office, Dec. 1982.

61. A separate battle between the parties involved the issue of attorneys' fees for Public Advocates. Attorneys at Public Advocates put in at least 7300 hours on the case and have spent in excess of 1500 hours monitoring provisions of the settlement. At one point, the issue of attorneys' fees threatened to become more complex than the underlying discrmination suit. Attorneys' fees were finally awarded under the terms of the consent decree. Officers for Justice v. San Francisco Civil Serv. Comm'n, 473 F. Supp. at 820.

tors beyond the control of the plaintiffs that materially impede resolution of the litigation: the monetary settlement of the suit[62] has been delayed in its effectiveness by the lack of adequate funding for the police department. Contrary to the terms of the consent decree, the city has failed to provide adequate funding for the department's minority recruitment program and the scholarship fund for minorities. This in turn has led to an extension of the recruitment time and further delay in the selection and promotion of minorities.[63] Whether the goals of the consent decree will ever be met is a question not likely to be resolved in the near future. Meanwhile, in a city that boasts of its ethnic and cultural diversity, the membership of the police department remains largely white and male.[64]

Committee for Children's Television, Inc. v. General Foods Corp. (General Foods)

In the *General Foods* case,[65] Public Advocates instituted a consumer fraud action in California Superior Court on behalf of children and their parents against General Foods to prevent deceptive advertising directed towards children. The action arose out of allegedly false claims by General Foods regarding five breakfast products.[66] The plaintiffs charged that General Foods promotes these products as a nutritious grain breakfast for children by deceptive techniques and false statements about both the products and what the products do. Specifically, the complaint alleged the following instances of fraud in General Foods' advertising campaign: there is no honey in "Honeycomb," although defendants represent that there is;[67] there is no fruit in "Fruity Pebbles";[68] sweet taste does not ensure nutritional merit;[69] "cereal" is a

62. Provisions for monetary relief under the consent decree are reported at *id.* at 817, 818, 824.

63. Memorandum of National Trives, Auditor-Monitor of Consent Decree to Chief Judge Robert F. Peckham, Sept. 1, 1981, *attached as* Exhibit A to Appellees' Brief in Opposition to Opening Brief of Intervenors and Appellant Police Officers Association, Officers for Justice v. San Francisco Civil Serv. Comm'n, No. 82-4079 (consolidated) (9th Cir. filed June 11, 1982).

64. *See* S.F. Chron., Apr. 19, 1983, at 1, col. 2, at 4, col. 1.

65. No. 61056 (Cal. Ct. App., 2d Dist., Mar. 30, 1982).

66. The products are "Cocoa Pebbles," "Fruity Pebbles" ("at least 50% sugar"), "Honeycomb" ("at least 42% sugar"), "Alpha Bits" ("at least 38% sugar"), and "Sugar Crisp" ("at least 43% sugar"). Appellant's Opening Brief at 4, Committee for Children's Television, Inc. v. General Foods Corp., No. 61056 (Cal. Ct. App., 2d Dist., filed Mar. 30, 1982).

67. Record at 1061, Committee for Children's Television, Inc. v. General Foods Corp., No. 61056 (Cal. Ct. App., 2d Dist., Mar. 30, 1982).

68. *Id.*

69. *Id.* at 1055.

grain, not a mixture of sugar and chemicals;[70] large amounts of chocolate are not good for children to eat for breakfast;[71] these candy breakfasts are not "the most important part of a balanced breakfast";[72] and eating "Honeycomb" will not make a child bigger or stronger.[73]

The original complaint was filed by plaintiffs on June 30, 1977. A lawyers' pleading game followed. The defendants repeatedly demurred for failure to state a cause of action, resulting in the filing of four amended complaints by plaintiffs.[74] The defendant's final demurrer was sustained on July 27, 1979,[75] and plaintiffs' entire case was dismissed. The California Court of Appeal, clearly hostile to the entire concept of the case, affirmed.[76] The appellate court held, inter alia, that the complaint contained "mere conclusionary allegations"[77] and that specificity required setting forth every single time the ads were aired and the channel on which they were aired.[78] Because plaintiffs alleged that *every* ad for each of the five products was fraudulent and that the basis of the allegation of fraud was the ongoing, saturation advertising campaign using hundreds of commercials, this was an impossible burden. In effect, it would have necessitated amending the complaint every time an ad was broadcast.

Thus, at a time when courts favor the liberal construction of pleadings,[79] four and one half years have passed since the filing of *General Foods* and the suit never moved past the demurrer stage. By the time *General Foods* goes to trial, if it ever does, a generation of children will have been subject to these allegedly fraudulent and harmful commercials. Children who were fourth graders when the case began are now teenagers whose eating habits may well have been influenced by these commercials. The case illustrates the inadequacies of litigation, especially when brought against a wealthy defendant that is represented by a large corporate law firm. For them, litigation, time, and legal fees are

70. *Id.* at 1054, 1058.

71. *Id.* at 1056.

72. *Id.*

73. *Id.* at 1055.

74. Plaintiff's First Amended Complaint was filed on August 19, 1977; the Second on March 23, 1978; the Third on September 21, 1978; and the Fourth on May 15, 1979.

75. No. CA000429 (Cal. Super. Ct., Los Angeles County, filed July 27, 1979).

76. Committee for Children's Television, Inc. v. General Foods Corp., No. 61056, slip op. (Cal. Ct. App., 2d Dist., Mar. 30, 1982).

77. *Id.* at 9.

78. *Id.* at 10. The case is now pending before the California Supreme Court.

79. *See, e.g.*, Foman v. Davis, 371 U.S. 178, 181-82 (1962); *see also* J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 15.02 (2d ed. 1976) (rules on pleadings emphasize that pleadings are not an end in themselves, but only a means to the proper presentation of a case).

not of paramount concern, as long as revenues are maintained. In fact, it has been the experience of Public Advocates that one of the primary tactics of large corporate defendants is to engage in lengthy and costly litigation in an effort to discourage or impoverish public interest plaintiffs.

Punikaia v. Clark (Hale Mohalu)

Judicial recalcitrance is another obstacle to the vindication of unpopular rights. Local political pressures and ingrained stereotypical thinking often result in the persistence of legally erroneous rulings, notwithstanding higher court pronouncements to the contrary. This has been exemplified in the *Hale Mohalu*[80] case, in which Public Advocates represented Hansen's Disease (leprosy) patients in their struggle to retain their home at Hale Mohalu, an eleven-acre residential facility on the island of Oahu.[81]

In 1978, the State of Hawaii cut off, without any court order, all utilities, food services, and medical assistance at Hale Mohalu in order to coerce the leprosy patients to leave. On September 5, 1978, those patients filed a complaint in federal court and a temporary restraining order was entered compelling the state to restore all services.[82] On September 21, 1978, a federal district court denied the plaintiffs' motion for a preliminary injunction and dismissed their complaint for lack of standing and for failure to state a claim upon which relief may be granted.[83] The plaintiffs then appealed to the Ninth Circuit which remanded the case to ascertain whether the plaintiffs had an entitlement

80. Brede v. Director for Dep't of Health for Hawaii, 616 F.2d 407 (9th Cir. 1980).

81. The Hale Mohalu facility was originally established on federal land. The United States, in return for a commitment by the State of Hawaii to provide care for the state's leprosy sufferers, conveyed the land to the state, subject to a 21-year maintenance condition. Despite the fact that Hawaii permitted the facility to deteriorate over the years, the federal government did not utilize its right to require maintenance. On March 23, 1977, the maintenance condition expired and Hawaii's title became a fee simple absolute. Shortly thereafter, the state began proceedings to close the facility and move its residential and medical support services to Leahi Hospital in Honolulu. A number of the facility's residents chose to remain because of Hale Mohalu's residential facilities and its location allowing easy access to friends and family. Over the last decade, advances in medical science have enabled physicians to treat leprosy patients through outpatient services. As a result, the inpatient residents remaining at Hale Mohalu were among the more elderly, afflicted, and crippled of the leprosy population.

On January 26, 1978, the Hale Mohalu facility was officially closed. The state provided water, electric power, telephone service, food, medical care, and supplies for the remaining patients until September 1, 1978, when these services were terminated. *Id.* at 409-10.

82. *Id.* at 410.

83. *Id.*

to services at Hale Mohalu and if so, whether any hearings necessary to afford due process should be held.[84]

On remand, the plaintiffs filed an amended complaint and moved for a preliminary injunction. The federal district judge denied that motion on July 28, 1980,[85] and plaintiffs appealed that judgment to the Ninth Circuit again. On November 27, 1981, the Ninth Circuit remanded the case to the district court to hold an evidentiary hearing to determine whether the plaintiffs did in fact have a liberty or property interest in the services at Hale Mohalu.[86]

On the second remand, the plaintiffs moved for summary judgment and for a preliminary injunction. Although the court indicated that it would only rule on the motion for injunction and that it would not consider the summary judgment motion, on March 5, 1982, the court denied both motions, entered summary judgment for the defendants without any evidentiary hearing, and dismissed plaintiffs' entire case.[87] And so it is that litigation continues for more than four years after the state cut off services.

The March 5, 1982, opinion of the district court misconstrued the rulings of the two prior appellate orders, chastized the appellate court for misunderstanding the facts, and reinstated a holding that had already been overruled.[88] In so doing, the judge put plaintiffs back to the same position they were in before two successful appeals. For a plaintiff group composed of elderly people, such protracted litigation as a result of lower court defiance of appellate rulings does not merely mean a delay before rights are enjoyed. As a practical matter, it denies plaintiffs' rights altogether.[89]

84. *Id.*

85. Brede v. Director for Dep't of Health for Hawaii, No. 78-0336 (D. Hawaii July 28, 1980).

86. Punikaia v. Yuen, No. 80-4433 (9th Cir. Nov. 27, 1981).

87. Punikaia v. Yuen, No. 78-0336 (D. Hawaii 1982) (order entering summary judgment for defendants dated Mar. 5, 1982), *aff'd sub nom.* Punikaia v. Clark, No. 82-4189, slip op. (9th Cir. Sept. 7, 1983).

88. *Id.*

89. The Ninth Circuit recently affirmed the grant of summary judgment for the state by the district court in its order of March 5, 1982. The circuit court held that the plaintiffs possessed no legitimate entitlement to continued medical care and residence facilities at Hale Mohalu based on the Hawaii statutes. Punikaia v. Clark, No. 82-4189, slip op. at 4308 (9th Cir. Sept. 7, 1983). In holding that the closing of Hale Mohalu did not amount to a deprivation of plaintiffs' property interests by the state and that they were therefore not entitled to a due process hearing, the Ninth Circuit stated that its decision was compelled by O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980), decided after *Brede*. In *O'Bannon*, the Supreme Court held that a state's decertification of a private nursing home, although resulting in the closure of the facility and the risk that its patients would suffer

County of Kauai v. Pacific Standard Life Insurance Co. (Nukolii)

In the *Nukolii* case, Public Advocates represented a large community group that successfully halted the further construction of 150 resort condominium units and a 350-room hotel on twenty-five acres of oceanfront property on Hanamaulu, Kauai, known as Nukolii.[90] When the property was purchased in 1974 it was originally subject to the land use classification of open space and agriculture, but the defendant developers, backed by substantial financial resources, obtained an amendment of the zoning code from "open/agricultural" to "resort."[91] Immediately thereafter, the Committee to Save Nukolii, a broad-based coalition, commenced a referendum drive to reinstate the open space zoning[92] and obtained certification of the referendum.[93] Rather than waiting to see if the referendum would pass, the developers proceeded with construction and accelerated their efforts to obtain building permits for the developments.[94] They succeeded in obtaining a building permit for the condominiums on October 31, 1980, only four days before the referendum vote.[95] The building permit for construction of the hotel was issued on the eve of the referendum vote.

On November 4, 1980, the electorate approved a referendum to repeal the resort zoning ordinance by a margin of two to one. The election results were certified by the county clerk on November 25, 1980.[96] At that time, approximately seventy percent of the condominium structures and a part of the hotel building were completed. The

transfer trauma, did not amount to a deprivation of any interest in life, liberty, or property. *Id.* at 784 n.16, 786-88. However, the Ninth Circuit noted that it had "specifically instructed the district court to make a factual finding as to the transfer trauma phenomenon . . . and the district court did not do so." Punikaia v. Clark, slip op. at 4309 (citations omitted). From this it can be inferred that the district court had ignored the higher court's order and that only the intervening Supreme Court decision obviated the need for yet another remand for findings on the transfer trauma issue.

90. County of Kauai v. Pacific Standard Life Ins. Co., 65 Hawaii 318, 321, 653 P.2d 766, 770 (1982), *appeal dismissed*, 103 S. Ct. 1762 (1983).

91. *Id.*

92. *Id.*

93. On January 30, 1980, the county clerk certified the referendum petition and the referendum question was placed on the 1980 general election ballot. *Id.*

94. The Committee sought an injunction to prohibit construction of the structures, alleging the building permits were not validly issued. The circuit (trial) court denied the request for injunctive relief on September 5, 1980. *Id.* at 321-22, 653 P.2d at 770-71.

95. Although the developers received a Special Management Area (SMA) permit in April 1980, final approval of the SMA permit was contingent on approval by the Department of Health of the developers' sewage treatment plan (STP). Final approval of the STP was given on October 31, 1980, and the SMA permit became valid on that date. *Id.* at 322, 653 P.2d at 771.

96. *Id.*

county filed an action for declaratory judgment and injunctive relief to determine the relative legal rights and duties of the parties under the referendum[97] and named the developers and the Committee as parties. The circuit court granted the motion, finding first that certification of the referendum petition did not suspend the zoning ordinance and that all permits were validly issued. The court also concluded that in reliance upon the existing zoning, the developers acquired vested rights to continue and complete the condominium and hotel projects and that the county was therefore equitably estopped from prohibiting construction.[98]

On appeal, the Supreme Court of Hawaii reversed. The court held that the developers had not met the good faith requirements under principles of equitable zoning estoppel.[99] The referendum was discussed three times in the special management permit decision of the county; it was a pivotal provision in the loan agreement covering the proposed condominium construction; and potential investors were warned that their rights under a sales contract were subject to the referendum results.[100] The county was therefore not equitably estopped from enforcing the 1980 zoning referendum as applied to the developer's project.[101]

Nukolii demonstrates how public interest lawyers can attain the objectives of a lawsuit, but only when certain factors are present. In this case, members of the community were extremely active, united, and organized in their environmental concerns and in their opposition to the resort development. More importantly, they were powerful actors in the process through the circulation and approval of the 1980 referendum. Such power (or, at least, expression of general community concern), political or otherwise, is rarely possessed by public interest clients. In *Nukolii*, the power of the community may have been the decisive factor in the outcome of the litigation.

Apart from the precedential value of the cases, *Nukolii* and *Hale Mohalu*, discussed above, also highlight the critical need for more public interest lawyers in general. The absence of a single major public interest law firm in Hawaii necessitated Public Advocates' involvement in the case. One major deterrent to public interest practice on the islands is the Hawaii Supreme Court's failure thus far to recognize vari-

97. *Id.* at 321, 653 P.2d at 770.
98. *Id.*
99. *Id.* at 328, 653 P.2d at 778.
100. *Id.*
101. *Id.* at 328-29, 653 P.2d at 779.

ous theories to support awards of attorneys' fees.[102]

Petition to Alleviate Domestic Infant Formula Misuse and Provide Informed Feeding Choice

In another arena, a typical problem faced by public interest lawyers is footdragging on the part of agency officials, notwithstanding the urgency of the issue at hand and widespread popular support. One example of this has been the response, or non-response, of the Food and Drug Administration (FDA) and the Department of Health and Human Services (DHHS) to a petition filed on June 17, 1981, by Public Advocates on behalf of fourteen national organizations. The "Petition to Alleviate Domestic Infant Formula Misuse and Provide Informed Feeding Choice"[103] culminated more than a year of research, and documented the near epidemic misuse of infant formula among low income families, the formula industry's role in discouraging informed feeding choices, and the increased infant mortality and morbidity associated with formula use.

Despite a FDA regulation mandating a response by the agency within 180 days,[104] the FDA did not comply with the deadline of December 17, 1981. The petition did elicit a prompt response from the industry: the elaborate response of the Infant Formula Council, written by its lobbying and public relations arm, was both filled with industry-generated data and filed within the time frame set out by agency response.[105] Repeated requests for agency action on the petition yielded nothing until petitioners threatened legal action to compel a response. Finally, on February 19, 1982, the FDA and DHHS issued a preliminary response which, while indicating broad areas of agreement with petitioners, took no action other than to state that petitioner's recommendations would be considered in the FDA's rulemaking proceeding.[106] Further, the response indicated that review of the petition was still ongoing; therefore, the agency's response was of an interim nature.[107]

102. *See* Shoemaker v. Takai, 561 P.2d 1286 (Hawaii 1977), where the Hawaii Supreme Court adhered to "the traditional American rule that attorneys fees cannot be recovered as damages or costs where not so provided by statute, stipulation or agreement." *Id.* at 1291.

103. National League of United Latin Am. Citizens v. Schweiker, No. 81P-0206 (F.D.A. June 17, 1981).

104. 21 C.F.R. § 10.30(3)(2) (1982).

105. Infant Formula Council's Response to Public Advocates Petition Concerning Infant Formula and Informed Feeding Choice, filed Nov. 19, 1981.

106. Letter from Edward N. Brandt, Secretary for Health, to Public Advocates, Inc. (Feb. 19, 1982).

107. *Id.*

Petitioners immediately responded, setting a deadline for the agency to elaborate on its plan to meet the objectives that it had agreed with petitioner were essential. Three months later, DHHS responded, clarifying its position, providing some information on its current activities and plans but in effect indicating that the petition and related materials were still under review.[108] And so it is that almost two years after the filing of the petition, low income women continue to be denied the right to make informed feeding choices, and infants of low income families continue to be subjected to the risk of increased mortality and morbidity.

Beyond Litigation

As the foregoing cases suggest, judicial and administrative forums may not be the pivotal places for the practice of public interest law. Public Advocates has attempted to reform and enforce the laws for their clients and others in more direct, political ways. Public Advocates recently issued a 100-page report entitled "Trust Betrayed, Hope Denied"[109] on the status of disabled persons in the United States. The document detailed the Reagan Administration's unprecedented attack on the rights of persons with disabilities through severe financial cutbacks in the areas of education, housing, job training, medical treatment, transportation, and legal services. The purpose of the report, 500 copies of which were issued to community groups, legislators, and the media, was to document the harsh consequences and negative economic effects of the present administration's cutbacks in vital programs. Such a report can be an effective method of informing the public and those in a position to influence decision making about the rights of disadvantaged groups and the shortsighted and unfair effects of governmental policies.

Conclusion

The practice of public interest law is not unlike the myth of Sisyphus, who was compelled to roll a stone to the top of a slope, the stone always escaping him near the top and rolling down again. Likewise, attempting to secure remedies for public interest clients often involves legal victories, only to have real relief elude them. Additionally, lengthy and costly litigation, judicial recalcitrance, powerless clients,

108. Letter from Edward N. Brandt, Secretary for Health, to Public Advocates, Inc. (June 8, 1982).

109. PUB. ADVOC., INC., TRUST BETRAYED, HOPE DENIED: AN URGENT REPORT ON THE STATUS OF DISABLED AMERICANS (1982).

and agency footdragging all constitute formidable obstacles to the attainment of relief.

Compounding these problems is the present state of public interest law, which worsens every day due to drastic cutbacks in legal services and the consequent foreclosure of the public interest market to law school graduates. The failure of law schools and the legal community to address these problems can only result in an ever-increasing need for legal representation and an ever-dwindling supply of public interest lawyers. Unfortunately, the people who will suffer the most are those who cannot afford legal services and whose very lives often depend upon some legal representation to protect threatened rights. Until and unless public interest practice becomes a recognized, viable and thriving branch of law, nurtured instead of minimized by the law schools, and free from destructive financial and political attacks, equal access to justice for all will not be realized.